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Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of Oct. 20, 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 245

M. A. TILBURY, DOING BUSINESS AS TILBURY'S SOUTHERN MEAT COMPANY, PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 80-89) [1] is reported at 123 F. Supp. 109. The opinion of the Court of Appeals (Pet. App. B) is reported at 220 F. 2d 757.

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[1] Record references are to the petitioner's appendix to its brief in the Court of Appeals accompanying the petition for a writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered April 21, 1955. Petitioner's petition for rehearing was denied May 10, 1955. The petition for certiorari was filed July 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. 201 *et seq.*), are:

> Definitions
>
> Sec. 3 [52 Stat. 1061; 63 Stat. 911]. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.
>
> * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Maximum Hours

Sec. 7 [62 Stat. 912]. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

Prohibited Acts

Sec. 15 [52 Stat. 1068]. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

QUESTION PRESENTED

Whether employees, whose regular and unsegregated duties consist of boning, removing, or otherwise handling, bones and other inedibles which are shipped outside the State, are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, as amended, even though such goods constitute only a small proportion of the employer's total production.

STATEMENT

This action was brought by the Secretary of Labor[2] under Section 16(c) of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, pursuant to written requests by petitioner's employees to recover unpaid overtime compensation (R. 71-72) allegedly due and owing them.

Petitioner is engaged at Shreveport, Louisiana, in the wholesale distribution of meat, meat products and meat by-products, and employs a number of butchers and boners who are regularly engaged in cutting and boning meat in accordance with the

[2] By order of the District Court entered November 3, 1953, James P. Mitchell, the present Secretary of Labor, was substituted for Martin P. Durkin, resigned.

specifications and requirements of petitioner's customers (Dist. Ct. opinion, R. 80, 82, 83). In the butchering and boning operation, there results a residue of valuable by-products, such as bones and inedible portions of meat, which the butchers and boners regularly and necessarily handle or otherwise work on in the course of their employment (*id.*, R. 83). Such by-products are produced simultaneously with the preparation of meat cuts, and their production, therefore, involves practically all the working time of the butchers and boners (*id.*, R. 85). It was stipulated that it is a regular part of the duties of the butchers and boners to place such by-products in containers (Stipulation, R. 61 62), so that they may be easily collected. These by-products are regularly sold to a meat rendering firm, and all of them are shipped out of the State in the form of meat scraps, cracklings, tankage, animal food and tallow (Dist. Ct. Op., R. 83; Stip., R. 61, 62). For the two year period ending January 31, 1953, these by-products totaled approximately 210,764 pounds or approximately 8.45 percent of the total tonnage of meat products sold by petitioner, representing approximately $2,496.26 in sales value (Dist. Ct. Op., R. 84; Exh. A, R. 57). It was further stipulated, and the trial court specifically found, that petitioner "knew or had reason to believe" that these by-products would be shipped outside the State of Louisiana (Dist. Ct. Op., R. 83-84; Stip., R. 61-62).

The trial court found that the employees involved worked an average 56-hour workweek dur-

ing the period covered by the complaint and that they were not paid extra compensation for overtime as required by the Act. (R. 85-86).

On the basis of these undisputed facts, the district court concluded that the employees were substantially engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, citing this Court's decision in *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, and the Tenth Circuit's decision in *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236, certiorari denied, 318 U.S. 774, and directed that judgment be entered for plaintiff for recovery of underpayments to specified employees (Op. R. 80-89, Judgment, R. 96-97). Petitioner's motion for a new trial or rehearing was denied. (R. 91-92.) On appeal, the Court of Appeals for the Fifth Circuit affirmed *per curiam* for the reasons stated in the opinion of the district court. (Appendix B to Pet.). A petition for rehearing in the Court of Appeals was denied on May 10, 1955.

ARGUMENT

The decision below is correct; it accords with principles well settled by the decisions of this Court, and does not conflict with the decisions of any other Court of Appeals.

1. The work performed by petitioner's employees in connection with the inedible by-products falls squarely within the statute's definitions of "production of goods for commerce." Sections 3(b), 3(i), 3(j). It is settled that the Act extends at

least to the production of goods which the employer "intends or expects to move in interstate commerce." *United States* v. *Darby,* 312 U.S. 100, 118; *Warren-Bradshaw Co.* v. *Hall,* 317 U.S. 88.

There is no dispute that the employees work indiscriminately on the by-products as well as on the edible meat products (R. 85; R. 72-78), and that this work is regular, recurrent and unsegregated *(Id.).* The fact that petitioner's principal business is intrastate does not preclude the applicability of the Act, for this Court has made it clear that it is the character of the employees' work and not the character of the employer's business that is determinative of the Act's applicability. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Warren-Bradshaw Co.* v. *Hall,* 317 U.S. 88; *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564; *Overstreet* v. *North Shore Corporation,* 318 U.S. 125.

The fact that only a small percentage by value of petitioner's production moves out of the state does not establish that this production or the time devoted to it by the employees is not substantial. *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178; *United States* v. *Darby,* 312 U.S. 100; *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564.[3] Equally

[3] The decisions of the Courts of Appeals holding the Act applicable to employees of employers whose percentage of interstate production was similarly small, but regular and recurrent and unsegregated, are too numerous to list completely. For representative decisions see, in addition to the *Mabee, Darby* and *Peoples Packing Co.* decisions, *supra, Mitchell* v. *Royal Baking Co.,* 219 F.2d 532 (C.A. 5); *Foremost Dairies, Inc.* v. *Ivey,* 204 F.2d 186 (C.A. 5); *Chapman* v. *Home Ice*

without merit are petitioner's contentions that the bones and inedibles are merely residual "by-products," and that the work of petitioner's employees does not assist in "beneficially preparing" the goods for interstate commerce and is "too many steps removed from the final entrance of the commodity into Interstate Commerce" (Pet. 5-6). The definition of "goods" includes "products, commodities, * * * or articles or subjects of commerce of *any* character, or *any part or ingredient* thereof." Section 3(i) (emphasis added); *Western Union Telegraph Company* v. *Lenroot,* 323 U.S. 490; *Walling* v. *Peoples Packing Co.,* 132 F. 2d 236 (C.A. 10), certiorari denied, 318 U.S. 774. And goods are no less goods produced for commerce because further processing intervenes before shipment. *Schulte Co.* v. *Gangi,* 328 U.S. 108; *Walling* v. *Peoples Packing Co., supra.*

2. There is no conflict among the circuits. On the contrary, the decision below is in accord with the other decision of a Court of Appeals directly in point both factually and legally. *Walling* v. *Peoples Packing Co.,* 132 F. 2d 236 (C.A. 10), certiorari denied, 318 U.S. 774. There, as here, the employer's main business consisted of the dressing and sale of meat which was distributed within the State. Only the by-products, constituting but a small percentage of the goods handled or worked

Co. of Memphis, 136 F.2d 353 (C.A. 6); *Sun Publishing Co.* v. *Walling,* 140 F.2d 445 (C.A. 6), certiorari denied, 322 U.S. 728; *Schmidt* v. *Peoples Telephone Union of Maryville,* 138 F.2d 13 (C.A. 8); *New Mexico Public Service Co.* v. *Engel,* 145 F.2d 636 (C.A. 10).

on, were shipped in the interstate commerce by the rendering concerns to whom they were sold. The Tenth Circuit held that the employees in working on the carcasses, removing and handling the hides and offal, were performing the first step in the series of operations that produced the articles that went into commerce. Therefore, the employees were held to be engaged in the production of goods for commerce (132 F. 2d at 240).

Hunter v. *Madison Avenue Corporation,* 174 F. 2d 164 (C.A. 6), certiorari denied, 338 U.S. 836, is plainly inapposite here. The decision there rested on the ground that the work involved was simply maintenance of an ordinary office building like the building in *10 East 40th Street Building, Inc.* v. *Callus,* 325 U.S. 578, and was premised on the ground that the employer was not a producer of any goods. Also, unlike the situation here (R. 61-62, 83-84), it does not appear in the *Hunter* case that there was any showing that the defendant "knew" or "reasonably should have known" that the waste paper collected as an incident to cleaning the building would ultimately move outside the State.

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CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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